No. 866

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OHLIN H. ADSIT,

Plaintiff in Error,

vs.

G. KAUFMAN,

Defendant in Error.

Brief for Plaintiff in Error.

ALFRED SUTRO,

Attorney for Plaintiff in Error.

Filed October 23d, 1902.

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk.

JOHN PARTRIDGE, STATIONER AND PRINTER, 306 CAL'A ST., S. F.

IN THE

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OHLIN H. ADSIT, *Plaintiff in Error,* vs. G. KAUFMAN, *Defendant in Error.*	No. 866.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

This action was brought to recover the sum of $650., for the use and occupation for twenty-six months at $50. per month, of an undivided one-half interest in the premises known as Lot No. 4, in Block No. 4, in the town of Juneau, Alaska. It is contended by the plaintiff (Tr., p. 8), and it is admitted by the defendant, that the defendant used and occupied the premises for

twenty-six months, to wit: From April 1, 1894, to July 1, 1896 (Tr., p. 10); but the defendant denies that he is indebted to the plaintiff in any sum for such use and occupation (Tr., p. 10). On April 23, 1894, the plaintiff caused to be served on the defendant a notice to the effect that the plaintiff was the owner of an undivided one-half of the premises, and demanding payment of half the rent. The notice was as follows:

" Messrs. Toklas & Kaufman,
Juneau, Alaska.

You are hereby notified that O. H. Adsit, Esq., of Juneau, Alaska, is the owner of an undivided one-half part or interest of, in, and to lot numbered four (4) in block numbered four (4), in the town of Juneau, Alaska, being the premises now occupied by you under the business name of 'The New York Store'; and you are hereby requested to pay to said Mr. O. H. Adsit the one-half of all the rent due from you for said premises and the occupation thereof by you, and to pay such rent to no one excepting to the said Mr. Adsit, unless upon the written order signed by said Mr. Adsit.

Very respectfully,
JOHN G. HEID,
Attorney for O. H. Adsit." (Tr., p. 40.)

In 1896 the plaintiff herein brought suit in the United States District Court for the District of Alaska against one John F. Malony, for an undivided one-half of said lot Number 4 (Tr., pp. 21-23). In that action the Court found that on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of said lot and that plaintiff is the owner of an undivided one-half thereof. (Tr., pp. 33 and 34.)

Judgment was accordingly entered that plaintiff was the true and lawful owner of the undivided one-half of said lot. (Tr., pp. 17 and 18.) (Upon appeal to the Supreme Court of the United States this judgment was affirmed. *Malony* v. *Adsit*, 175 U. S., 281.) Thereupon plaintiff brought this action to recover from the defendant the sum of $650., being for one-half of the reasonable value of the use and occupation of the premises by the defendant from April 1, 1894, to July 1, 1896, at the rate of $50. per month. It was proved that $50. per month was the reasonable value of the use and occupation of the premises (Tr., pp. 36–38). The defendant claimed that he held possession under John F. Malony (Tr., p. 39), being the same person against whom plaintiff brought suit for an undivided one-half of the premises.

At the close of the plaintiff's testimony the defendant moved the Court to instruct the jury to return a verdict in favor of the defendant (Tr., p. 41). The Court granted this motion upon the theory that the notice given by plaintiff to defendant was of no effect; that the relation of landlord and tenant did not exist between them, and that the defendant occupied the premises as tenant of Malony (Tr., pp. 41-44). The jury returned a verdict as directed (Tr., p. 45), and judgment was accordingly entered (Tr., pp. 47, 48). To all of which plaintiff duly excepted.

The errors relied upon for a reversal of this judgment are contained in the following specification :

Specification of the errors relied upon.

FIRST: That the United States District Court for Alaska, Division No. 1, erred in the opinion and decision given in the presence of the jury upon the defendant's motion to direct a verdict in favor of the defendant, as is set forth in said bill of exceptions, as follows :

"A tenant is one who occupies the lands or premises of another in subordination to that other's wish, and with his assent, either express or implied; but in order to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, per se, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title but without his assent, he is a mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

"Where a person goes into possession wrongfully,

it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of a trespasser to that of tenant. In such a case the contract must be explicit, and embrace all the elements, previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of a trespasser to that of tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

"Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these parties to continue in the occupation of his premises provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it, if there must be assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery.

"Now, Mr. Heid, the only question in my mind is

this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. That you may, under proper circumstances, waive the tort, the wrongful taking or detention of the premises, and sue on an implied contract: For example, if a man steals my horse I need not pursue him in tort. I may waive the tort and sue for the value of the horse on an implied promise on the part of the thief to pay for what he takes from me. That is the only theory upon which this could be maintained in the condition it now is.

"When this case was up before my curiosity was somewhat excited, because the very defense that is now presented here was not presented in that action. It seemed to me then that the action could be maintained in the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that

the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages are not alleged. I simply say that on the face of this judgment there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

"And despite the fact as it appears from the evidence, that Mr. Adsit hasn't been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

"Gentlemen of the jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendant, and I do this on the theory that in the action as brought and under the facts as proved, the plaintiff has no right to a recovery. You may select one of your number as foreman—I will select Mr. Rose as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendant."

(To which instruction, and in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

SECOND: That the said United States District Court erred in granting the defendant's motion to direct the jury to return a verdict for the defendant, as set forth in paragraph 2 of the "Assignment of Errors."

THIRD: That the said United States District Court for Alaska, Division No. 1, erred in entering a judgment in favor of the defendant and in dismissing the action of plaintiff, instead of entering a judgment in favor of plaintiff as prayed for in his complaint.

ARGUMENT.

1. The defendant is liable to the plaintiff under an implied agreement to pay a reasonable sum for the use and occupation of the premises.

It is not necessary that there should be an express contract for the payment of rent for the use and occupation of premises. A liability to pay a reasonable sum for such use and occupation may be founded upon an implied agreement.

Oakes v. *Oakes*, Adm., 16 Ill., 106.

In that case the Court said :

"There is no evidence of an express contract for rent, nor is there any evidence that the defendant's intestate was a trespasser or intruder upon the land, or that he in any way held it against the will of the owner, nor is it shown that there was any agreement or understanding that the tenant was to enjoy the land without rent. Under such circumstances the

law will infer an implied agreement to pay a reasonable rent for the premises."

In *Chambers* v. *Ross*, 25 N. J. L., 293, the Court said :

" There was no express contract between the parties, and none was necessary. The law will imply a contract to pay rent from the mere fact of occupation, unless the character of the occupancy be such as to negative the existence of a tenancy. The action for use and occupation does not necessarily suppose any demise. *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp., 467; *Hull* v. *Vaughan*, 6 Price, 157; 2 Saund. Pl. & Ev. 890 ; Chitty on Cont., 332."

Do the facts and circumstances surrounding the parties in this case establish an implied agreement on the part of the defendant to pay a reasonable sum for the use and occupation of the premises involved in this action? Plaintiff contends that they most certainly do. The defendant went into the possession of certain premises ; the plaintiff chose to waive the tortious act of defendant's taking possession without his permission and to regard the defendant as his tenant. This he could do. See *Welch* v. *Bagg*, 12 Mich., 41; *Catterlin* v. *Spinks*, 16 Ala., 467; *Phelps* v. *Church*, etc., 99 Fed., 683. He at once gave notice of his ownership of one-half of the premises to the defendant and that the defendant should pay him one-half of the rent. *The defendant continued in possession of the premises after receipt of the notice, without any act or claim of adverse right, or inconsistent with an acknowledgment and full recognition of the plaintiff as the rightful owner of the undivided one-half interest.* These facts we

submit fully and completely establish an implied agreement on the part of defendant to pay plaintiff one-half of the value of the use and occupation of the premises, based upon a recognition of plaintiff's claim of ownership. Had defendant by any act controverted plaintiff's title, then the defense he has interposed would be sound. *Jackson* v. *Mowry*, 30 Ga., 143. The mere fact that defendant paid another who claimed to be the owner of the premises, without in anywise notifying the plaintiff of such payment, is no defense to an action by the plaintiff, who is the real owner. *Cross* v. *Freeman*, 54 S. W., 246. *No act of the defendant could possibly be construed into a claim of possession adverse to the plaintiff. The theory upon which the trial court decided this case is based upon that of adverse possession. But here there was no adverse possession.* The defendant was not a trespasser; plaintiff chose to treat him as his tenant and he did not object. If the position of the defendant in this action were sound, then the owners of property would be at the mercy of fraudulent lessors and over-credulous lessees. Suppose Smith went to Johnson and said: "I am the owner of the Cliff House in San Francisco and will let the same to you for $1,000 per month"; whereas, in fact, the Cliff House belongs to Brown. Johnson, who is a responsible person, takes possession of the Cliff House, and Brown at once gives notice to Johnson of his ownership and of his claim for the rent. Notwithstanding the notice, Johnson remains in possession, neither disputes nor makes

any claim of adverse title to Brown's claim of ownership, pays no attention to the notice, and, without any word to Brown, pays the rent to Smith. Brown, who is satisfied with Johnson as a tenant, suffers him to remain in possession for two years and then brings action against him for the value of the use and occupation of the premises. Could Johnson contend that the payment of the rent to Smith was a defense to the action? It is true that a tenant cannot dispute the title of his landlord; but this rule is founded, like all other rules of law, upon common sense, and in this instance it is that a tenant has satisfied himself of his landlord's title before he assumes possession of the proffered premises and places himself in a position in which he cannot deny his lessor's title. Had the defendant in the case at bar exercised ordinary diligence and prudence upon receipt of the notice from plaintiff, he would have discovered that his lessor was not the full owner of the premises. If he thought that there was a dispute over the ownership of the property which he did not care to determine by paying one-half of the rent to each claimant, he should, as an ordinarily prudent business man, either have refused to use and occupy the premises, or he should have availed himself of the adequate and ample remedy provided by law, of paying the amount of the value of the use and occupation of the premises into court to be interpleaded by the rival claimants. *Instead, he remained absolutely silent. His silence implied a consent to remain in possession of the premises pursuant to the terms of the*

notice; the relation of landlord and tenant became fully established by implication, and the defendant, we submit, became liable to pay the plaintiff for one-half of the full value of the use and occupation of the premises.

2. The defendant is estopped from denying his liability to the plaintiff.

The defendant, by retaining possession of the premises after the receipt of notice from plaintiff, and by failing to dispute plaintiff's claim, led the plaintiff to believe that his claim was recognized and that he would receive one-half of the rent. Defendant, by reason of his silence and his acquiescence, is now estopped from asserting a claim and contention which he should have made promptly upon receipt of the notice. *He tacitly encouraged the plaintiff to believe that his demand for one-half of the rental value of the premises would be honored; his conduct induced the plaintiff to refrain from taking any steps to enforce his claim for rent.* Defendant cannot now change his position so as to pecuniarily prejudice the plaintiff.

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."

Swain v. *Seamens*, 9 Wall. 254, 274.

See also: *Pokegama etc. Co.* v. *Klamath River, etc. Co.*, 96 Fed. 34, 54.

Horton v. *Mercer*, 71 Fed. 153.

Allen West Co. v. *Patillo*, 90 Fed. 628.
Scott v. *Jackson*, 89 Cal. 258.

If the defendant claimed that payment of rent to Malony, under whom he professed to hold the premises, was in full satisfaction of his obligation to pay rent, why did he not so state to the plaintiff when the notice was served? It would have been a very easy and simple matter for him to have answered the notice given him by the plaintiff and to have told the plaintiff that he did not recognize his claim of ownership. Plaintiff would then have taken such steps as he might have been advised to enforce his claim of ownership to the premises. Instead he relied, as he had a right to do, upon defendant's acquiescence in and recognition of his claim of ownership. Under these circumstances we submit that *the defendant is estopped from denying that the plaintiff is entitled to one-half the value of the use and occupation of the premises.*

It is respectfully submitted that the judgment should be reversed and that the plaintiff should have judgment for $650., with interest at eight per cent. per annum from July 1, 1896, and for his costs.

ALFRED SUTRO,

Attorney for Plaintiff in Error.

Dated, San Francisco, October 23, 1902.